MOTION FILED
OCT 16 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 77-1578 and 77-1583

BROADCAST MUSIC, INC., et al.,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,

Respondent.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF, *AMICUS CURIAE*, AND BRIEF OF AMERICAN BROADCASTING COMPANIES, INC., AS *AMICUS CURIAE*

CLARENCE FRIED
Attorney for American Broadcasting Companies, Inc., as Amicus Curiae
Office & P.O. Address
67 Wall Street
New York, New York 10005
(212) 952-4700

Of Counsel:

HAWKINS, DELAFIELD & WOOD
New York, New York

TABLE OF CONTENTS

PAGE

Motion for Leave to File *Amicus Curiae* Brief 1

Brief of American Broadcasting Companies, Inc., as *Amicus Curiae* 3

Interest of the *Amicus Curiae* 4

Argument 4

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Alden-Rochelle, Inc. v. *ASCAP*, 80 F.Supp. 888, and 80 F.Supp. 900 (S.D.N.Y. 1948) 5, 6n

Citizen Publishing Co. v. *United States*, 394 U.S. 131 (1969) 6

Northen Pacific Ry. Co. v. *United States*, 356 U.S. 1 (1958) 6

Plymouth Dealers' Ass'n of Northern California v. *United States*, 279 F.2d 128 (9th Cir. 1960) 6

M. Witmark & Sons v. *Jensen*, 80 F.Supp. 843 (D. Minn. 1948), *appeal dismissed mem. sub. nom. M. Witmark & Son* v. *Berger Amusement Co.*, 177 F.2d 515 (8th Cir. 1949) 5, 5n

United Sttaes v. *ASCAP*, 1950-51 Trade Cas. ¶ 62,594 5n

United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) 6

Other Authority:

Sherman Act, Section 1 ..... 3, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 77-1578 and 77-1583

BROADCAST MUSIC, INC., et al.,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,

Respondent.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION BY AMERICAN BROADCASTING COMPANIES, INC. FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

American Broadcasting Companies, Inc. ("ABC") hereby petitions this Court for leave to file the annexed brief *amicus curiae*. ABC owns and operates a nationwide television network. In the course of its business, ABC obtains, for programs offered by the ABC television network, blanket licenses from ASCAP and BMI for the nondramatic performance rights to music in their repertories.

In 1977, ABC paid ASCAP and BMI approximately $5,800,000 for blanket licenses to use their respective pools of musical compositions. ABC is directly interested and will be affected by any decision this Court may render concerning the lawfulness, under the antitrust laws, of the licensing practices of ASCAP and BMI with respect to television networks. Counsel for BMI and ASCAP have orally consented to the filing of an amicus curiae brief by ABC. Accordingly, ABC requests permission to file the annexed brief *amicus curiae*.

Dated: New York, New York
December 15, 1978

Respectfully submitted,

CLARENCE FRIED
Attorney for American Broadcasting Companies, Inc., as Amicus Curiae
Office & P.O. Address
67 Wall Street
New York, New York 10005
(212) 952-4700

Of Counsel:

HAWKINS, DELAFIELD & WOOD
New York, New York

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978
Nos. 77-1578 and 77-1583

BROADCAST MUSIC, INC., et al.,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMERICAN BROADCASTING COMPANIES, INC., *AMICUS CURIAE*

American Broadcasting Companies, Inc. ("ABC") submits this brief as *amicus curiae*, in order to advise the Court of ABC's interest in the decision by the Court of Appeals below and to urge affirmance of that decision with respect to the claim that ASCAP and BMI are engaged in price-fixing in violation of section 1 of the Sherman Act. Counsel for BMI and ASCAP have orally consented to the filing of an *amicus curiae* brief by ABC.

Interest of the *Amicus Curiae*

ABC owns and operates a nationwide television network. It obtains television performance rights to music used in programs produced or licensed by ABC for broadcast over stations owned by or affiliated with ABC, by obtaining blanket licenses from ASCAP and BMI. The blanket license from ASCAP and the blanket license from BMI cover every musical composition in the ASCAP and BMI repertories regardless of how little or how much music is played during the year. The license fees paid by ABC to ASCAP and BMI are based only on a percentage of income and have no relationship to actual performance of music. The situation with reference to the CBS blanket licenses obtained from ASCAP and BMI is substantially the same as that of ABC. In 1977, ABC paid ASCAP and BMI blanket license fees amounting to approximately $5,800,000.

Accordingly, ABC has a direct and substantial interest in any decision by this Court regarding the licensing practices of ASCAP and BMI, and, in particular, in any decision that will result in and foster competition—which presently does not exist—in the licensing of non-dramatic performance rights for music on network television. Although ABC has not filed its own antitrust action against ASCAP and BMI, ABC will certainly be affected by this Court's decision in this action.

Argument

Musical compositions offered for use in programs broadcast by television networks should be competitively priced. The pooling by ASCAP and BMI of virtually all musical compositions and the pooling of the proceeds derived from

the licensing of such compositions constitute a violation of the antitrust laws. It was so decided in *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F.Supp. 888, 893, and 80 F.Supp. 900, 904 (S.D.N.Y. 1948). The Court of Appeals correctly held here that the ASCAP and BMI blanket licenses constitute price fixing in violation of Section 1 of the Sherman Act and observed that "Our objection to the blanket license is that it reduces price competition among the members and provides a disinclination to compete." (562 F.2d 130, 140)

Initially, it should be noted that there is no reason why individual composers and publishers cannot compete on a price basis to have their music licensed and used by program producers and networks in television programs. Indeed, the way in which theatrical performance rights for music in movies are licensed to movie producers provides the model for the way in which a competitive market in television performance rights should work. As a result of *Alden-Rochelle, supra, Witmark**, and the 1950 ASCAP consent decree**, the producer of a movie negotiates directly with individual publishers and composers for the right to record the music in question along with the movie, *and* for the right to have the music "performed" (exhibited) as part of the movie in theatres; then, as part of the license agreement between the producer and each theatre owner concerning exhibition of the movie, the theatre owner obtains all the rights necessary to exhibit the movie, including music performances. On the other hand, in the television field, producers license synchronization rights in direct negotiations with individual composers and publishers; but television performance rights in the music

---

* *M. Witmark & Sons* v. *Jensen*, 80 F.Supp. 843 (D. Minn. 1948), *appeal dismissed mem. sub nom. M. Witmark & Sons* v. *Berger Amusement Co.*, 177 F.2d 515 (8th Cir. 1949).

** *United States* v. *ASCAP*, 1950-51 Trade Cas. ¶62,594.

pools controlled by ASCAP and BMI are obtained on a blanket basis, rather than from the producers of the programs.

Thus, the license fees paid by ABC to ASCAP and BMI are fixed through the ASCAP and BMI instrumentalities for the combination of otherwise competing music composers and copyright proprietors and not by "the unrestrained interaction of competitive forces" (*Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1 (1958)) among the copyrights in the pool (and other copyrights, as well). See, *e.g., Citizen Publishing Co.* v. *United States,* 394 U.S. 131 (1969); *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940); and *Plymouth Dealers' Ass'n of Northern California* v. *United States,* 279 F.2d 128 (9th Cir. 1960).*

The theoretical "retained right" under the ASCAP consent decree permitting ASCAP members to deal outside the combinations is irrelevant and, in any event, does not change the fact that ASCAP is unlawfully fixing a price for the pooled products. *United States* v. *Socony-Vacuum Oil Co., supra; Plymouth Dealers' Ass'n* v. *United States, supra.* First of all, the "retained right" has never been exercised. Moreover, because ASCAP insists on issuing blanket licenses at fees that have no relationship to a television network's actual use of ASCAP music during the term of the licenses, the alleged "retained right" is meaningless and of no practical benefit to the individual member. Furthermore, the "retained right" of ASCAP members to deal directly does not dilute the effect of

* The suggestion that ASCAP's and BMI's price-fixing is excused because a blanket license is a special "product" is without merit. That argument was correctly rejected by the Court of Appeals. Anything that ABC obtains through a blanket license could be obtained at least as efficiently and cheaply in a competitive, direct-licensing market, such as the one which exists for movie performance rights for music, under *Alden-Rochelle, supra.*

ASCAP's price-fixing power, given the risks of loss and the competitive disadvantage to ABC (or CBS or NBC) if it unilaterally tried to bypass ASCAP. Such risks of loss and disadvantage arise from a number of factors, including (1) the fact that the blanket license dulls ASCAP members' incentive to compete (*see* Pet. App. 20a, 22a) and therefore makes the prospect of success in direct-licensing less likely, if not entirely remote (or more costly), and (2) the problem of acquiring licenses for music that is already "in-the-can" (*see* Brief for the United States at 24-25 & n. 23).

It must also be emphasized that there can be no reason, other than a desire to continue to eliminate price competition, for ASCAP and BMI to refuse to license on a per-use basis, which is clearly less restrictive than a blanket licensing arrangement, and which is directly related to musical performance. Surely, it is feasible for ASCAP and BMI to license on a per-use basis, in view of the fact that performances are logged and royalties are paid to members on that very basis.

Finally, with respect to the Solicitor General's Brief, it should be noted that the Court of Appeals (in considering whether the blanket system was necessary, and in concluding it was not) already performed, in all respects pertinent, the rule of reason analysis which that Brief now urges should be undertaken. Moreover, the application of a per se rule where blanket licensing is not necessary, was urged by the Department of Justice in 1971 in an ASCAP consent decree proceeding instituted by NBC. The Department stated, in part:

> "[W]hat is eliminated under a license for ASCAP's entire repertory is price competition between ASCAP members. This result is tolerated to the extent that blanket and per program licensing is a practical

necessity. It is on that basis that the result in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (C.A. 9), certiorari denied, 389 U.S. 1045 (1967), can be supported. There the courts upheld ACSAP's licensing practices against the challenge of local broadcasters who concededly could not negotiate directly with individual ASCAP members for performing rights. NBC has not made a similar concession here, and in fact wants to begin dealing directly. ASCAP's refusal to cooperate is thus not based upon practical necessity, is without legal justification, and is simply a collective arrangement with the effect of maintaining prices: a *per se* antitrust violation. *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940)." Department's Brief in *United States* v. *ASCAP (Application of National Broadcasting Company)*, attached as an appendix to NBC's amicus brief at 15a.

The Department's apparent reversal of position in this Court is unexplained, illogical and wrong. The "collective arrangement with the effect of maintaining prices" has not changed and, if anything, is reemphasized by the failure and refusal of ASCAP to issue per-use licenses on the basis of music actually performed.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

Dated: New York, New York
December 15, 1978

Respectfully submitted,

CLARENCE FRIED
Attorney for American Broadcasting Companies, Inc., as Amicus Curiae
Office & P.O. Address
67 Wall Street
New York, New York 10005
(212) 952-4700

Of Counsel:

HAWKINS, DELAFIELD & WOOD
New York, New York